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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ST. PAUL-RAMSEY MEDICAL CENTER, INC.,
Petitioner,

v.

DONNA E. SHALALA, Secretary,
Department of Health and Human Services,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

RONALD N. SUTTER
Counsel of Record
CHRISTOPHER L. KEOUGH
POWERS, PYLES, SUTTER & VERVILLE, P.C.
1875 Eye Street, NW
12th Floor
Washington, DC 20006-5409
(202) 466-6550
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF FOR THE PETITIONER

INTRODUCTION

The provision at issue states in plain and simple terms that "[t]he Secretary shall determine [for a 1984 base year] the average amount recognized as reasonable under this subchapter for direct graduate medical education costs of the hospital for each full-time-equivalent resident." 42 U.S.C. § 1395ww(h)(2)(A). Read in common parlance and in light of the Act as a whole, similar provisions within it, and the long-standing administrative scheme established under it, the provision is clear and has only one possible meaning: The Secretary must "determine" the pertinent "average" based on the "amount recognized as reasonable" under the established process for determining such costs.

To sustain her alternative construction—under which the Secretary purportedly is authorized to retroactively dismantle the preexisting regulatory regime, reopen closed audit years, and subject providers to reaudits and base

year cost determinations for periods with respect to which critical documentation had been discarded in accordance with the regulatory scheme in effect at the time the statute was enacted—the Secretary attempts to manufacture ambiguity in the plain and simple terms of § 1395ww(h)(2)(A) (Br. 19-21), repeatedly seeks refuge in the alleged absence of an express prohibition of an extraordinary procedure (Br. 19 n.8, 21, 26, 29), and attempts to gain favor with the Court by suggesting that her interpretation was necessary to serve an end (accuracy) that the Secretary herself acknowledges Congress did not even have in mind when it enacted the statute (Br. 27). As explained below, none of these efforts can overcome the clear command of § 1395ww(h)(2)(A), to which both the Secretary and this Court are required to give effect under *Chevron* and the fundamental principles of separation of powers embodied in that decision. Moreover, the regulation issued by the Secretary to implement her construction, which retroactively revoked the reopening and record retention standards in effect in the base year and departed from the substantive standards then in effect, contravenes the bar against retroactive rulemaking established by this Court's precedents.

ARGUMENT

I. THE SECRETARY'S REAUDIT REGULATION VIOLATES THE PLAIN MEANING AND CLEAR INTENT OF 42 U.S.C. § 1395ww(h)(2)(A).

1. The Secretary misstates the question in this case.[1] The question is not whether the Secretary could reaudit 1984 graduate medical education ("GME") costs. She clearly could, so long as she did so within the reopening and record retention periods applicable to 1984 and applied the reimbursement standards in effect in 1984, including the consistency rule.

[1] The question presented by the Secretary is whether she "reasonably construed 42 U.S.C. 1395ww(h) to authorize the reaudit of a hospital's GME costs incurred in the base year for the purpose of determining the reimbursement due in subsequent years."

The question here is whether the Secretary could reaudit 1984 *after* expiration of the applicable reopening and record retention periods using new reimbursement standards not in effect in 1984. The Secretary concedes that she could not have conducted such a reaudit to amend the amount recognized as reasonable in the notice of program reimbursement ("NPR") for 1984 itself (Br. 7, 8-9 n.5, 39). She argues, however, that she was entitled to conduct an untimely audit to determine the average 1984 amount per resident under the GME legislation and to use as the numerator an amount that differs from the actual amount recognized as reasonable in the final and binding NPR for 1984. The Secretary's position conflicts with 42 U.S.C. §1395ww(h)(2)(A), which requires her to determine the average based upon the "amount recognized as reasonable under this subchapter" for 1984. The Secretary failed to use that amount and thus violated Congress' clear command.

2. The Secretary struggles to create ambiguity but her efforts cannot obscure the fact that § 1395ww(h)(2)(A) is simple and straightforward. The statute simply authorizes the Secretary to determine an "average." *Toledo Hosp. v. Shalala*, 104 F.3d 791 (6th Cir. 1997), *petition for cert. filed*, No. 96-2046, Pet. App. 29a-30a. It does not authorize the Secretary to redetermine the numerator and then determine the average.[2]

The Secretary argues (Br. 17) that the GME statute permits her to determine a new amount of GME cost (different from that actually recognized for 1984) so long as she applies the reasonable cost payment principles in effect in 1984. As discussed in § II, the Secretary has,

[2] The Secretary reads words into the GME statute that are not there. She asserts (Br. 44), for instance, that the "GME Amendment . . . instructed the Secretary to determine base-year GME costs that would affect payments for all cost periods beginning on or after July 1, 1985." In fact, the GME legislation does not "instruct" the Secretary to "determine base-year GME costs" at all. It simply mandated that the Secretary determine an average. *Toledo*, Pet. App. 29a-30a.

in fact, departed from the reasonable cost payment principles in effect in 1984 in her reaudits. Further, the statute provides no basis for the Secretary's attempt to detach 1984 reasonable cost reimbursement standards from the 1984 administrative scheme used to establish the amount recognized as reasonable under those standards. The words "under this subchapter" do not just follow the word "reasonable," as the Secretary suggests (Br. 21). They follow a phrase that begins with the word "amount" —"amount recognized as reasonable." 42 U.S.C. § 1395ww(h)(2)(A).

It is well-established that Congress is presumed to be aware of the existing statutory and regulatory regime governing the area in which it legislates. Pet. Br. 21. That principle (entirely ignored in the Secretary's brief) is particularly forceful here. When Congress used the phrase "amount recognized as reasonable under this subchapter" in the 1986 legislation, there was an administrative scheme, which had been in effect under the Medicare subchapter for nearly 20 years (Pet. Br. 6, 19-20; Br. 2-4), that would recognize an amount as reasonable for 1984.

Moreover, Congress had twice within the previous four years used a nearly identical phrase—"recognized under this subchapter"—in other subsections of the same section of the Medicare statute (§ 1395ww) that likewise used a base year amount to establish prospective payment limits for subsequent periods. Pet. Br. 30-32 (discussing 42 U.S.C. § 1395ww(a)(1)(C), (b)(3)(A)(i), (d)(1)(A)(i)(I), and (d)(1)(A)(ii)(I)). Inasmuch as the Secretary had in each of those instances acted with dispatch to recognize the base year amounts within the confines of the existing administrative scheme for recognizing costs as reasonable (Pet. Br. 30-32; Br. 28), Congress would not have used virtually identical terms in subsection 1395ww(h)(2)(A) if it had intended to grant the Secretary unbridled discretion to disregard the established administrative scheme in implementing that statute.

The simple fact is that in the GME legislation Congress did not confer on the Secretary *any* authority to determine a hospital's base year GME costs. Its failure to do so was not an oversight. The GME legislation reflects careful attention to detail and delegated authority to the Secretary where action by the Secretary was needed. Pet. Br. 23-26. Congress did not confer authority to determine base year GME costs because a long-standing process for determining those costs was already established under the Medicare subchapter, which is why the GME statute refers to the "amount recognized as reasonable *under this subchapter*." (Emphasis added.) Thus, as the Sixth Circuit correctly concluded in *Toledo*, "[w]hen Congress passed the GME amendment in 1986, it knew that there was an administrative scheme in place that would determine the reasonable GME costs for providers for fiscal 1984. . . . It follows that Congress must have contemplated that the Secretary would use those administratively determined reasonable costs as the basis for calculating the average GME cost per full-time-equivalent resident." Pet. App. 30a-31a.

3. The reaudit regulation is based on the premise that the Secretary was free, for purposes of the GME legislation, "to 'recognize' [1984 GME] costs at any time in the future and in a manner utterly detached from the established procedural framework." *Toledo*, Pet. App. 30a. That premise conflicts with Congress' command that the GME legislation "shall apply to hospital cost reporting periods beginning on or after July 1, 1985." Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), Pub. L. 99-272, § 9202(b). Congress did not authorize the Secretary to defer implementation of the GME amount per resident payment system.

To the contrary, Congress clearly expressed its intent that the Secretary would determine the average amounts per resident promptly and well within the reopening and record retention periods applicable to 1984. The 1986

COBRA legislation that enacted the GME statute also mandated in § 9202(e) that:

> [t]he Secretary of Health and Human Services *shall report* to [the Committee on Finance of the Senate and the Committees on Ways and Means and Energy and Commerce of the House of Representatives], *not later than December 31, 1987*, on whether section 1886(h) of the Social Security Act [42 U.S.C. § 1395ww(h)] should be revised to provide for greater uniformity *in the approved FTE resident amounts established under paragraph (2) of that section*, and, if so, how such revisions should be implemented.

(Emphasis added.) To comply with that mandate, the Secretary had to "establish" the "approved FTE resident amounts" (*i.e.*, the GME base year average amounts per resident) well before December 31, 1987, a date which preceded expiration of the reopening and record retention periods for 1984 in all cases.[3]

Section 9202(e) of COBRA proves that Congress did *not* intend the Secretary to determine the base year average by using as the numerator a "redetermined" amount of 1984 cost that differs from the actual amount recognized as reasonable for 1984. *See also Methodist Hosps. of Memphis v. Sullivan*, 799 F. Supp. 1210, 1218 (D.D.C. 1992) ("Congress could not have intended that the Secretary interpret 'recognized as reasonable' to mean two amounts for fiscal 1984: one derived from the standard cost reporting and review process following the close of the fiscal year; and a lower amount recalculated once the Secretary realized that the year would become the base-year for subsequent determinations."), *rev'd sub nom. Administrators of Tulane Educ. Fund v. Shalala*, 987 F.2d 790 (D.C. Cir. 1993), *cert. denied*, 510 U.S. 1064 (1994). Congress intended that the Secretary establish the amounts per resident before December 31, 1987—

[3] The Secretary failed to comply with Congress' mandate and did not file the required report until March 24, 1992.

at a time when all 1984 years were still within the Medicare reopening and record retention periods.[4]

Thus, viewed from the perspective of April 1986, when COBRA was enacted, the temporal ambiguity that the Secretary now attempts to impose on the statute was non-existent. Congress intended the Secretary to act promptly to implement the new payment system. COBRA, § 9202(b), (e). As the Secretary concedes (Br. 27), Congress had no concerns about the accuracy of the base year audits. Congress expected the Secretary to establish the base year amounts per resident in 1986 or 1987. COBRA, § 9202(e). If the Secretary had acted in accordance with Congress' mandate, she would have had no occasion to audit 1984 after expiration of the applicable reopening and record retention periods or to determine the base year amount per resident by using a 1984 amount

[4] The Secretary asserts (Br. 24) that "under petitioner's theory," she would have been free to reaudit the base year if she had "expressly amend[ed] the reopening regulation to lengthen the reopening period for base-year GME costs solely for purposes of determining the proper amount of reimbursement due in subsequent years under the GME Amendment, without disturbing the amount of reimbursement that the provider already had received for services that were rendered in the base year." In fact, the Secretary could not have done this for at least three reasons. First, the statute requires the Secretary to determine the base year average by using the actual amount recognized as reasonable under the Medicare subchapter for 1984. Thus, the statute does not allow the Secretary to determine the average by using an amount that is different than the amount that was actually recognized as reasonable for 1984. Second, the Secretary cannot *retroactively* amend the reopening and document retention standards in effect in 1984 and retroactively render her final and binding determination of 1984 costs non-final and non-binding, as she did in this case. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213-15 (1988). Third, extending the reopening period would have been inconsistent with Congress' intent that the Secretary implement the new methodology promptly and establish the base year amounts per resident well before December 31, 1987 (a date that in all cases substantially preceded expiration of the reopening and record retention periods for 1984). COBRA, § 9202(b), (e).

that differs from the amount actually recognized as reasonable for 1984. Thus, the Secretary's claimed ambiguity is based not on any uncertainty regarding Congress' intent when COBRA was enacted but on nothing more than the alleged absence of an express prohibition of "an unusual procedure . . . plainly at odds with the result Congress was trying to reach."[8] *Toledo,* Pet. App. 29a.

As discussed in the opening brief (Pet. Br. 42-43), the Secretary's "unusual procedure" would allow a perpetual series of reaudits of 1984. Because the Secretary became dissatisfied with her original audit determinations for 1984, she conducted a reaudit of 1984 in 1991, even though the reopening and record retention periods for 1984 had long since expired. If in 1998 she became dissatisfied with her 1991 reaudit of 1984, the Secretary would, under her logic, be free to reaudit 1984 again in 1998—and again in 2002 and 2004, if she chose. The statutory deadline established by COBRA, § 9202(e) clearly demonstrates that Congress did not intend to sanction such a bizarre result.

4. Perhaps recognizing the patent flaws of her position under 42 U.S.C. § 1395ww(h), the Secretary asserts (Br. 21) that she was entitled to issue the reaudit regulation under her purported "broad authority to promulgate regulations setting forth the methods to determine reasonable costs and the items to be included in reimbursable services." The Secretary's reliance on her general rulemaking authority is misplaced for several reasons.

First, an agency cannot exercise its general rulemaking authority to contradict the will of Congress. Pet. Br. 26

[8] The Secretary continues to anchor her ambiguity claim in the absence of an express prohibition. Br. 19 n.8, 21, 26, 29. As discussed above, the Secretary's position is inconsistent with the intent of the COBRA legislation and, in any event, her approach is ill-suited to discerning Congress' intent under *Chevron* step one. If sanctioned, it would give agencies "virtually limitless hegemony" under the *Chevron* framework. *Railway Labor Executives' Ass'n v. National Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc), *cert. denied*, 115 S. Ct. 1392 (1995); Pet. Br. 32-34.

n.8. As discussed above, Congress issued a straightforward command for the Secretary to determine an "average" using as the numerator the amount recognized as reasonable under the Medicare subchapter for 1984. The Secretary violated this plain command by using a different number established under a new and untimely administrative process.

Second, the reaudit regulation is not a "reasonable cost" regulation. It is a regulation purportedly issued to implement the GME prospective payment system established by COBRA. As discussed in Pet. Br. at 23-26, the GME statute is carefully crafted and significantly circumscribes the Secretary's authority. Where Congress intended to delegate authority to the Secretary, it did so expressly. *Methodist Hosps. of Memphis,* 799 F. Supp. at 1218. Indeed, the Secretary conceded this when she issued the GME regulation, noting that the statute is "largely self-implementing" and that she therefore had "little discretion in crafting" the regulation. 54 Fed. Reg. 40,314 (1989).

Third, the 1986 legislation refutes the Secretary's assertion of broad authority to legislate under her general rulemaking authority in 42 U.S.C. § 1395x(v)(1). The same section of COBRA that enacted the GME statute also enacted 42 U.S.C. § 1395x(v)(1)(Q), which provides:

> Except as otherwise explicitly authorized, the Secretary is not authorized to limit the rate of increase on allowable costs of approved medical education activities.

COBRA, § 9202(i). Even the Secretary concedes (Br. 17-18) that she was not "explicitly authorized" to conduct a special reaudit of 1984 costs under the GME statute after expiration of the applicable reopening and record retention periods. Moreover, the Secretary's general rulemaking authority would not allow the Secretary to ignore the statutory deadline imposed by COBRA, § 9202(e).

Finally, the Secretary's grants of general rulemaking authority do not confer on her retroactive rulemaking authority. *Georgetown,* 488 U.S. at 213-15. Thus, if the

Secretary, in fact, had the authority to apply new principles to 1984 and to retroactively revoke the reopening and record retention periods applicable to 1984 for purposes of implementing the GME statute, her authority must be found in the GME statute, not in her general grants of rulemaking authority. The Secretary recognized this fact when, at the time she issued the reaudit regulation, she stated that "the agency is not relying on our general grant of rulemaking authority to support retroactive application, but, rather, on a specific congressional enactment [the GME statute]." 54 Fed. Reg. 40,314 (1989).

5. Moving even further afield of Congress' intent in enacting § 1395ww(h)(2)(A), the Secretary asserts (Br. 17-18) that her reaudit of 1984 after expiration of the applicable reopening and document retention periods was necessary to prevent the perpetuation of base year errors for future years. She has, however, never presented any evidence of actual errors [6] or explained why, if there were errors, she could not have corrected them by the deadline mandated in COBRA, § 9202(e), a date within the established three-year reopening period for 1984. Moreover, the Secretary acknowledges (Br. 27) that neither "the text nor the history of the GME Amendment" indicates that *Congress* had any concerns regarding the accuracy of the Secretary's audit determinations.[7] Congress, therefore, could not possibly have intended, when it enacted the GME statute, to authorize the Secretary to conduct untimely reaudits to correct alleged errors in the amounts

[6] During the rulemaking process, the Secretary made only vague references to unidentified "situations" that had been "brought to our attention." 54 Fed. Reg. 40,300 (1989).

[7] The Secretary's concern regarding variations in the amounts per resident from hospital to hospital, 53 Fed. Reg. 36,593 (1988), would have come as no surprise to Congress. As discussed above, when Congress enacted the GME legislation, it directed the Secretary to report, "not later than December 31, 1987, on whether [the GME statute] should be revised to provide for greater uniformity in the approved FTE resident amounts established . . ., and, if so, how such revisions should be implemented." COBRA, § 9202(e).

recognized as reasonable for 1984 because, as the Secretary concedes (Br. 27), Congress had no reason to believe there were errors. As a result, the Secretary's purported "accuracy" concerns are irrelevant to this Court's inquiry under *Chevron* step one. *Toledo*, Pet. App. 32a-33a.

Furthermore, the Secretary ignores the plain fact that subjecting hospitals to a reaudit after expiration of the reopening and record retention periods, at a time when memories have faded, documents have been lost or discarded, and personnel have turned over, increases the likelihood of erroneous base year determinations. The Secretary's premise that untimely audits promote accurate results runs counter to common sense and the well-founded principle that the staleness of evidence, after expiration of a limitations period, forecloses a meaningful search for truth and requires repose.[8] Pet. Br. 37-38. Thus, "the normal policy of a statute of limitations is to close the door—finally, not qualifiedly or conditionally." *Anderson v. Yungkau*, 329 U.S. 482, 486 (1947). Once a limitations period has expired, there is an "irrebuttable presumption" of "prejudice[]." *United States v. Marion*, 404 U.S. 307, 322 (1971).

If the Secretary truly believed there were inaccuracies in the audit determinations for 1984, she had ample time

[8] The Secretary mischaracterizes the nature of the Medicare reopening standard. The Secretary's statement that the "Act itself does not place any limitations on the time in which a reimbursement decision" may be reopened (Br. 3) is true only because, as the Secretary fails to point out, the Act itself does not provide for any reopenings of administrative determinations at all. Instead, the Act characterizes the Secretary's NPR for a year as a "final determination" subject to appeal (without any reference to reopenings). 42 U.S.C. § 1395oo(a)(1)(A)(i). Thus, by allowing for a three-year reopening period (in addition to the statutorily-established appeals process), the Secretary's reopening regulations do not restrict what the Act would otherwise allow, as the Secretary implies. Instead, the Secretary's reopening regulations adopt a very expansive construction of the statute, *HCA Health Servs. of Oklahoma, Inc. v. Shalala*, 27 F.3d 614, 617-19 (D.C. Cir. 1994), that allowed the Secretary ample time to make any revisions to the 1984 NPRs that she believed to be necessary.

to reopen and revise the 1984 audit determinations through the administrative procedures established under the Medicare subchapter. Once the reopening and document retention periods had expired, she still had an available remedy—she could have informed Congress of the perceived problem and requested further legislation. *Toledo*, Pet. App. 33a.

If the Secretary had done so and if Congress had agreed with the Secretary's concerns, Congress would have been free to take a number of different courses. But, by acting on her own to remedy what she perceived to be a defect in the statute, the Secretary clearly exceeded her authority under the GME legislation. *See* COBRA, § 9202(e); *see also Board of Governors of Fed. Res. Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986) ("The statute may be imperfect, but the Board has no power to correct flaws that it perceives in the statute it is empowered to administer. Its rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute").

II. EVEN ASSUMING *ARGUENDO* AN AMBIGUITY IN THE STATUTORY LANGUAGE, THE REAUDIT REGULATION ADOPTS A PATENTLY UNREASONABLE CONSTRUCTION.

Even assuming that the reaudit regulation could pass muster under *Chevron* step one, it would nonetheless fail under *Chevron* step two because it is a patently unreasonable construction of § 1395ww(h)(2)(A).

1. As discussed previously (Pet. Br. 42-43), the Secretary's position would allow perpetual reaudits of 1984. Significantly, the Secretary has never denied that the logic of her position permits this result. Indeed, the Secretary underscores the absurdity of her position, arguing (Br. 39-40, 48) that, even though her reaudit is a reaudit of 1984, the relevant reopening period is the reopening period applicable to each year subject to payment under the GME statute, which would permit application of one determination of 1984 GME costs for 1987, another for 1990, another for 1993, and so on. Under the Secretary's

logic, a teaching hospital would be forever subject to reaudits of 1984, resulting in numerous amounts recognized as reasonable for 1984 and foreclosing the possibility of reaching repose. *Cf. Kennecott Utah Copper Corp. v. United States Dep't of Interior*, 88 F.3d 1191, 1211-13 (D.C. Cir. 1996) (rejecting under *Chevron* step two agency's construction of the word "promulgated" because it unreasonably deferred the date on which the statute of limitations would begin to run).

The Secretary's position stands logic on its head in another respect. The Secretary concedes (Br. 7, 13-14, 39) that once the limitations period expired for 1984, it was improper to reaudit 1984 to amend Medicare payment for 1984, but argues that because 1984 had a significant impact on payment for later years, it was permissible to conduct an untimely reaudit of 1984 to establish payment for later years. Reason dictates the opposite conclusion. The importance of the 1984 cost determination increases, not diminishes, the need to ensure that the determination is made at a time when memories are fresh and records are readily available so that accurate results are obtained.

Moreover, the Secretary's position conflicts with the plain wording of her regulations. The regulations governing the effect of an intermediary determination provide that, unless the determination is timely appealed or timely reopened, the "findings on matters at issue" in the determination, 42 C.F.R. § 405.1885(a), "*shall be* final and binding." 42 C.F.R. § 405.1807 (emphasis added). Those words are unqualified. They do not say that the intermediary's determination shall be final and binding for some purposes but not for others. Thus, as the Sixth Circuit concluded in *Toledo*, "the principle of issue preclusion prevents the Secretary from requiring providers to reestablish the costs that they already proved years ago." Pet. App. 36a.

2. The Secretary has represented in her brief (Br. 7, 14-15, 50) that the reasonable cost reimbursement principles in effect in 1984 were applied during the GME reaudits. In fact, that is not the case. As the Secretary's

regulations reflect, the Secretary revoked the consistency rule in effect in 1984 for purposes of the reaudit.[9] Pet. Br. 10, 43-45. Further, the Secretary's recent decision in *Blessing/St. Mary Group Appeal v. Blue Cross & Blue Shield Ass'n*, [New Developments] Medicare and Medicaid Guide (CCH) ¶ 45,554 (HCFA Adm'r 1997), plainly contradicts her representations to this Court.

In *Blessing*, the Secretary, through her delegate, the Administrator of the Health Care Financing Administration, annouced that the statement in the *Federal Register* preamble that "no new reimbursement principles will be applied during the reaudit" was intended to apply only "[w]ith respect to the documentation necessary to support a hospital's GME base-year costs." *Id.* at 54,786. The Secretary, therefore, concluded that a controlling Seventh Circuit precedent construing the GME reasonable cost regulation in effect during 1984 was inapplicable to the determination of the base year average amounts per resident even for hospitals located in the Seventh Circuit. The Secretary reasoned that the Seventh Circuit decision was inapplicable because it involved:

> cost periods prior to the effective data [sic] of COBRA, and they involved a different method of payment [*i.e.*, reasonable cost] for GME costs. Thus, the Administrator finds that those cases are not pertinent to the issues in this case involving base-year costs to be recognized for determining GME payments under the COBRA GME payment methodology.

[9] The Secretary's assertion (Br. 47) that she maintained consistency by permitting retroactive revisions to the PPS hospital-specific rate is absurd. The Secretary made conforming amendments to the PPS hospital-specific rate only if hospitals followed a restrictive procedure and were able to furnish documentation from 1982, which many quite understandably could not since the record retention period for 1982 had long since expired. Pet. App. 44-45. Moreover, the Secretary allowed no conforming amendments to the federal rate (the principal component of PPS) so that reclassification of costs in the GME reaudit resulted in allowable costs (whether characterized as operating or GME) not being allowed at all. *Id.*

Id. at 54,790 n.61. The *Blessing* decision confirms that the substantive reimbursement principles applied in the reaudits conducted "under the COBRA GME payment methodology" are quite different from the GME reasonable cost standards in effect during the GME base year (1984).

3. The Secretary's argument (Br. 35) that her 1991 reaudit of petitioner's 1984 year proves that "the Secretary was correct in the belief that hospitals had received excessive payments for GME costs in the base year" is circular. The fact that an untimely reaudit produced a lower amount than the timely audit conducted for 1984 is not at all surprising and hardly proves that the untimely reaudit was accurate and the timely audit was erroneous. Indeed, quite the opposite conclusion is required.[10] Appli-

[10] Petitioner was, in fact, very seriously prejudiced by the Secretary's untimely reaudit. Only $364,641 of the $9.9 million allowed as GME in the NPR for 1984 was determined to be nonallowable in the reaudit. Administrative Record 133-165 (adjustments 3-5, 28, 31, 38, 43-45, 47-51, 59, 63 & 91). Those costs were more than offset by $633,151 of costs that the intermediary classified as GME costs in the reaudit but that had not been classified as GME in the NPR. *Id.* (adjustments 10-11, 46, 82-90, & 163). Moreover, according to the audit adjustments, $228,098 (63%) of the $364,641 of costs determined to be nonallowable were disallowed in the reaudit solely because petitioner no longer had audit documentation to support the expense. *Id.* (adjustments 3, 5, 38, 43-45, 47, & 50-51).

The difference between the amount of GME costs recognized as reasonable in the NPR for 1984 and the amount of GME costs used to calculate petitioner's base year amount per resident is attributable solely to the *recharacterization* of GME costs as operating costs for purposes of the reaudit. Most of the difference relates to time reported as administrative time in the physician time studies conducted in 1984 using the time study format recommended by the Secretary. *Id.* (adjustments 92-116). In the original audit, the intermediary determined that the physicians' administrative services were performed in connection with the GME program and thus were allowable as GME costs rather than as operating costs. In the reaudit, the intermediary changed the classification of these expenses from GME costs to operating costs not because it uncovered new evidence demonstrating that the costs should be classified as operating expense, but because petitioner no longer had audit documentation, in a reaudit conducted six to seven years after

cation of the lower cost figure from an untimely audit proves that petitioner is, in fact, being significantly underreimbursed under the GME methodology.[11] *See Marion*, 404 U.S. at 322 (expiration of the limitations period raises an "irrebuttable presumption" of prejudice).

The Secretary's position seems to be that her reaudit figures are more accurate simply because they are lower. In fact, however, the reaudit figures are likely to be much *less* accurate because of the absence of critical documentation. More significant, there is absolutely no indication in the text or legislative history of § 1395ww(h)(2)(A) that Congress intended to penalize providers by subjecting them to reaudits of important base year amounts after the reopening and document retention periods had lapsed.

4. The Secretary erroneously asserts (Br. 42) that hospitals were put on notice by the proposed rule published on September 21, 1988, that the Secretary would reaudit 1984 and thus acted unreasonably in relying on the Secre-

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the base year, showing that the costs related specifically to GME, as opposed to other administrative activities benefitting the hospital generally. In the absence of such documentation, the Secretary simply applied a default rule in favor of characterizing the costs as operating costs rather than as GME costs.

[11] Significantly, the Secretary's original audit determination for 1984 was entirely in line with her determinations for prior years, including the PPS base year. The progression is as follows:

1981—$8,586,635
1982—$8,763,878
1983—$9,619,153.

Audited cost reports accompanying notices of program reimbursement dated September 9, 1983 (1981), March 2, 1984 (1982), and August 26, 1985 (1983). The amount of GME costs allowed in the NPR for 1984 ($9,892,644) was only 2.8% higher than the determination of GME costs for 1983 and only 15.2% higher than the determination of GME costs for 1981—in both cases, the rate of increase was below the rate of inflation in those years. In contrast, the Secretary's reaudit determination for 1984 ($5,916,868), conducted when petitioner's personnel had turned over and records were often no longer available, is an aberration. The amount of the Secretary's reaudit determination for *1984* is only 68.9% of the amount of GME costs that the Secretary recognized as reasonable for *1981*.

tary's reopening and record retention standards. The proposed notice, in fact, nowhere suggested that reaudits would be conducted after the base year was closed. *Cf.* 53 Fed. Reg. 36,592 (1988). Nor did it furnish adequate notice of the burden that the Secretary ultimately imposed on teaching hospitals. *Toledo*, Pet. App. 37a ("brief mention in the Federal Register of the possibility of reaudits . . . cannot be considered notice of the need to retain physician allocation and compensation records"). Further, a proposed notice obviously could not revoke the standards in effect in 1984 or justify the Secretary's failure to compute the base year average using the actual amount recognized as reasonable for 1984, as the statute requires.

5. The Secretary argues (Br. 32-33) that the reaudit was consistent with Congress' purpose to "limit payments to hospitals for their direct costs of approved medical education activities. . . ." H.R. Conf. Rep. 99-453, 99th Cong., 1st Sess. 482 (1985). Resort to the general purposes of legislation is the "last redoubt of losing causes." *Director v. Newport News Shipbuilding & Dry Dock Co.*, 115 S. Ct. 1278, 1288 (1995); *see also Dimension Fin. Corp.*, 474 U.S. at 374 ("Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself . . . prevents the effectuation of congressional intent").

The terms of the GME statute specify how Congress intended to "limit payments." Congress did not authorize the Secretary to establish additional, extra-statutory means. To the contrary, Congress provided: "Except as otherwise explicitly authorized, the Secretary is *not authorized* to limit the rate of increase on allowable costs of approved medical education activities."[12] COBRA, § 9202(i) (emphasis added).

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[12] As previously discussed (Pet. Br. 34-35 n.16), the Secretary's reliance on 1990 legislation governing the recoupment of alleged GME overpayments (Br. 37-39) is misplaced. The relevant congressional intent here, of course, is that of the Congress that enacted § 1395ww(h) in 1986, not that of the Congress that enacted the 1990 provision. *See Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 840 (1988); *International Bhd. of Teamsters*

III. THE REAUDIT REGULATION CONSTITUTES AN IMPERMISSIBLE RETROACTIVE CONSTRUCTION OF THE GME STATUTE.

The Secretary's reaudit regulation goes beyond the confined element of retroactivity inherent in § 1395ww(h). Unlike the statute, the reaudit regulation does not simply attach new future consequences to transactions that occurred in 1984. The reaudit regulation requires a new determination of matters at issue with respect to 1984 transactions (*i.e.*, the amount of reasonable GME costs incurred in 1984) after expiration of the period in which findings on matters at issue for the 1984 base year could be reopened and subject to new legal principles not in effect in 1984. The regulation, therefore, "changed the *law* retroactively, a function not performable by rule under the APA" in the absence of express authorization from Congress. *Georgetown*, 488 U.S. at 220 (Scalia, J., concurring) (emphasis in original).

Thus, the Secretary's reliance on the principle that legislation is not retroactive merely because it draws upon antecedent facts for its subsequent operation is entirely

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v. United States, 431 U.S. 321, 354 n.39 (1977). Moreover, the 1990 legislation is fully consistent with petitioner's plain meaning construction of § 1395ww(h)(2)(A). As the Secretary acknowledges (Br. 41 n.20), despite the enactment of the GME legislation, the Secretary continued to apply "reasonable cost" principles to settle 1986-1989 cost reports, rather than use the GME methodology mandated by law. Because, as all agree, hospitals were not entitled to reimbursement under reasonable cost principles for those years, recoupment was required to effectuate the GME legislation, irrespective of the proper resolution of the issue in this case. The 1990 legislation simply protected hospitals from the severe cash flow problems that might otherwise have occurred if the Secretary effected recoupment for all years at one time.

Furthermore, the House Report cited by the Secretary (Br. 38) is not part of the history of the legislation enacted in 1990. The cited report was issued with respect to a bill (H.R. 5828) that was never passed by the House, not with respect to the House bill that led to the enactment of the 1990 legislation. Moreover, the language used in the applicable provision of the unenacted bill was significantly different than the language used in the statute that was enacted.

misplaced. The Secretary's regulation does not draw upon antecedent facts. Rather, the Secretary's calculation of the average base year amount per resident depends upon "antecedent facts . . . *as currently determined*." Br. 49 (emphasis added). Those redetermined "facts" are not "antecedent" to the reaudit regulation. The only "facts" pertaining to petitioner's reasonable GME expenses for the 1984 base year that are "antecedent" to the 1989 reaudit regulation are the "findings on matters at issue" in the NPR for 1984, which, as the Secretary concedes (Br. 8-9 n.5), was final, binding, and no longer subject to reopening prior to the adoption of the reaudit regulation.[18] 42 C.F.R. §§ 405.1807, 405.1885(a).

The Secretary's reaudit regulation extended a limitations period after it expired. Accordingly, it is retroactive, *Hughes Aircraft Co. v. United States*, 117 S. Ct. 1871, 1878 (1997), and is therefore invalid in the absence of a clear statement of Congressional intent to authorize reaudits of 1984 after expiration of the three-year reopening period. *Georgetown*, 488 U.S. at 208. Even the Secretary concedes (Br. 17-18) that the GME legislation includes no such clear statement.

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[18] Thus, the Secretary's bald assertion (Br. 14, 49-50 n.24) that the reaudit regulation does not create a new cause of action against hospitals or increase their liability with respect to 1984 conduct is absurd. The reaudit of the final and binding findings on matters at issue in the NPR for 1984, which is the event giving rise to this action, could not have been performed but for the Secretary's retroactive rescission of both the three-year reopening limitation for 1984 and the record retention period for 1984.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

RONALD N. SUTTER
Counsel of Record
CHRISTOPHER L. KEOUGH
POWERS, PYLES, SUTTER & VERVILLE, P.C.
1875 Eye Street, NW
12th Floor
Washington, DC 20006-5409
(202) 466-6550
Counsel for Petitioner

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